No. 16,104

United States Court of Appeals

For the Ninth Circuit

States Marine Corporation of Delaware, a corporation, *Appellant,*

vs.

Victory Carriers, Inc., a corporation, and Shipowners & Merchants Towboat Co., Ltd., a corporation, Claimant of the Tug Sea Scout, *Appellees,*

and

Shipowners & Merchants Towboat Co., Ltd., *Appellant,*

vs.

Victory Carriers, Inc., a corporation, *Appellee.*

OPENING BRIEF FOR APPELLANT STATES MARINE CORPORATION OF DELAWARE.

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OPENING BRIEF FOR APPELLANT STATES MARINE CORPORATION OF DELAWARE.

This is an appeal to the United States Court of Appeals for the Ninth Circuit from an interlocutory admiralty decree entered by the United States District Court for the Northern District of California, Southern

Division, the Honorable Louis E. Goodman presiding, for full damages in favor of libelant, Victory Carriers, Inc. (hereinafter called "Victory Carriers" or "shipowner") against respondent-petitioner, Shipowners & Merchants Towboat Co., Ltd. (hereinafter called "Red Stack" or "tugboat company") and in favor of respondent for half damages against respondent-impleaded, States Marine Corporation of Delaware (hereinafter called "States Marine" or "time charterer").

JURISDICTION.

This cause was begun on the admiralty side of the District Court by libel *in rem* and *in personam* filed by Victory Carriers as owner of the vessel SS LEWIS EMERY, JR. against the Tug SEA SCOUT and her owner Shipowners & Merchants Towboat Co., Ltd., for damage suffered by the vessel in collision with the tug on January 23, 1957 (R. 3-7). Shipowners & Merchants Towboat Co., Ltd., commonly known as "Red Stack", filed a petition under Admiralty Rule 56 (R. 13-20) claiming indemnification from time charterer States Marine for any damages assessed against Red Stack resulting from pilot error.

The cause was tried to the Honorable Louis E. Goodman on February 25 and 26, 1958. On March 3, 1958 the District Court filed a preliminary order indicating its intention to find that the collision resulted from the combined fault of the Ret Stack pilot aboard the SS LEWIS EMERY, JR. and the operator of the Tug SEA SCOUT (R. 29-30) (reported at 1958 AMC 1173). After argument and briefing respecting the liabilities among the

parties which would derive from the proposed finding as to navigational fault, on May 12, 1958 the District Court filed its Order for Decree (R. 30-33) (reported at 164 F. Supp. 701 and 1958 AMC 1173) following which the District Court filed its Findings of Fact and Conclusions of Law (R. 39-46) on June 2, 1958 and the Interlocutory Decree holding Victory Carriers entitled to recover full damages from Red Stack and Red Stack entitled to recover one-half of such damages from States Marine was filed June 2, 1958 and entered June 3, 1958 (R. 47-49). Within 15 days thereafter, on June 17, 1958, States Marine filed its Notice of Appeal (R. 49-50) and Cost Bond on Appeal (R. 51-53).

Jurisdiction of this admiralty matter was vested in the District Court under Article III, Sec. 2 of the United States Constitution and 28 U.S.C. 1333 (1).

Jurisdiction of this Honorable Court of Appeals exists under 28 U.S.C. 41, 1292(3), 1294 and 2107, Notice of Appeal having been filed within 15 days from entry of the Interlocutory Decree (R. 49, 51).

STATEMENT OF THE CASE.

On the evening of January 23, 1957 Red Stack's Tug SEA SCOUT came in collision with Victory Carriers' Liberty type vessel LEWIS EMERY, JR. causing damage to the vessel. There was no damage to the tug. At the time of the collision, Garner H. Long, employed by Red Star as Master of the Tug SEA SCOUT, was on board the vessel SS LEWIS EMERY, JR. serving as pilot. Both the pilot of the vessel and the operator of

the tugboat were general employees of Red Stack. The District Court found that the collision was caused by the combined negligence of the pilot and of the operator of the Tug SEA SCOUT, which finding is not contested on this appeal.

At the time of collision the vessel LEWIS EMERY, JR. was under time charter to States Marine pursuant to written Charter Party entered into between Victory Carriers and States Marine under a standard form, known as "Government Form—Approved New York Produce Exchange" (Libelant's Ex. 16, R. 75). States Marine had ordered the undocking service which Red Stack was performing at the time of the collision, including the supplying of the Tug SEA SCOUT and Pilot Garner H. Long, in performance of States Marine's contractual obligation to Victory Carriers under Clause 2 of the Charter Party to "provide and pay for . . . Pilotages, Agencies . . ." (Finding IV, R. 41).

There is no claim that States Marine was negligent or that any act by States Marine or its employees contributed to the collision.

Victory Carriers' Libel (R. 3) basically claimed that the collision was caused by the fault of the Red Stack Tug SEA SCOUT while Red Stack's Answer (R. 8, 11) alleged that the collision resulted solely from the negligence of Red Stack employee Garner R. Long acting as pilot. The Impleading Petition (R. 13) of Red Stack against States Marine claimed contractual indemnification for damages that might be adjudged against Red Stack for negligence of Red Stack pilot Garner H. Long. In its formal Answer to the Libel (R. 20, 22) States Marine

alleged Victory Carriers' contractual undertaking to remain solely responsible for navigation of the vessel. In its Answer to the Impleading Petition (R. 23-28) States Marine denied that the pilotage clause of May 4, 1956 relied upon by Red Stack was the contract between the parties and denied Red Stack's allegations as to States Marine's warranty of authority and lack of authority to bind Victory Carriers to a pilotage clause (R. 27). States Marine affirmatively answered that Red Stack's negligent operation of its Tug SEA SCOUT barred Red Stack from any claim for indemnity it might otherwise have (R. 28).

It was Red Stack's contention in the District Court vis-a-vis States Marine that one half of the total collision damages were allocable to the negligence of the pilot and that such one-half should be recouped by Red Stack from States Marine on the grounds that (1) Victory Carriers could not legally have recovered full damages if Victory Carriers had been bound by a "pilotage clause", (2) that States Marine was contractually bound to Red Stack in the terms of a form letter dated May 4, 1956 and sent about that time by Red Stack to States Marine (R. 60, Respondent's Ex. C, R. 61-62), which read in pertinent part:

> "If any such vessel is not owned by the person or company ordering the tug and/or piloting service, it is understood and agreed that such person or company warrants its authority to bind the vessel and her owners to all the provisions of the preceding paragraph and agrees to indemnify and hold harmless this company and such pilot and any assisting tug, its owners, agents, charterers, operators or man-

agers, and each of them, with respect to all losses, damages and/or expenses that may be suffered or incurred in consequence of such person or company not having such authority.''

(3) Victory Carriers was not bound to the pilotage clause because States Marine was not authorized to so bind Victory Carriers and (4) that the language of Respondent's Ex. C (R. 61-62) was such as to validly and legally entitle Red Stack to indemnity from States Marine.

States Marine urged in the District Court that the contractual undertaking of Victory Carriers to remain responsible for ''the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account'' (Libelant's Ex. 16, Clause 26, R. 75), was for the benefit of, and protected, Red Stack as a subcontractor, performing a function, ''pilotage,'' which States Marine under the Charter was required to ''provide'' (R. 33-39). States Marine further urged that it was authorized under the Time Charter to bind the vessel owner to whatever pilotage clause was required to enable States Marine as time charterer to perform its duty of ''providing . . . Pilotages, Agencies . . .''. Evidence was presented at the trial to show that Victory Carriers during the twelve months immediately preceding the collision of January 23, 1957 had itself dealt with Red Stack, had received invoices from Red Stack for tugboat service (R. 79), and that all invoices sent out by Red Stack contained the form of pilotage clause imprinted on Impleaded Respondent's Ex. A (R. 66a) (testimony of witness Collar (R. 67-68)). General Steamship Cor-

poration, Ltd., of San Francisco, which had served as husbanding agent for other vessels of Victory Carriers calling in San Francisco during such preceding 12 months (R. 73-74, 80), according to Red Stack witnesses Collar had also been sent (R. 68-69) copies of Red Stack's letter dated May 4, 1956, Respondent's Ex. C (R. 61-62). It was the position of States Marine at the trial in the District Court that the pilotage clause, if any, which was contractually binding at the time of the collision was that clause which appears printed on the bottom of the invoice submitted by Red Stack to States Marine for the very services in question, Impleaded Respondent's Ex. A (R. 66a), which had been consistently used by Red Stack in its billings for all tugboat services during the 12 months immediately preceding January 23, 1957 (witness Collar R. 67-68) and which was identical to the clause in use on Red Stack's invoices at the time of the SS JULES FRIBOURG collision (R. 68) which gave rise to litigation between States Marine and Red Stack reported as *People of the State of California v. The Jules Fribourg* (N.D.Cal. 1956) 140 F. Supp. 333. In the *Jules Fribourg* case the U. S. District Court for the Northern District of California, Judge Louis E. Goodman, held such clause did not entitle Red Stack to indemnity from time charterer States Marine for collision damage resulting from error of a Red Stack tug master serving as pilot on board a time chartered vessel.

Red Stack was the only firm in the San Francisco Bay Area which offered a complete undocking service (R. 70) and the only company providing large horsepower deep draft tugs (R. 71).

The issue of primary general importance presented by this appeal is whether the time charterer of a vessel, regardless of the form of pilotage clause in use by the individual tugboat company, can be subjected to liability for collision damage suffered by the vessel through pilot error, by reason of its performing its contractual obligation with the vessel owner to order an undocking service. This primary issue, which is of considerable commercial importance, will depend on this Honorable Court's answers to the questions (1) did Victory Carriers remain responsible for navigation as to Red Stack which had been delegated to perform pilotage under the Time Charter by States Marine and (2) was States Marine authorized to bind, and was Victory Carriers therefore bound, to a pilotage clause by virtue of the provisions of the time charter that States Marine should "provide . . . Pilotage, Agencies . . ." while Victory Carriers should "remain responsible for navigation of the vessel, insurance, crew, and all other matters." In the context of the present case, affirmative answers to either of these questions would mean Red Stack not entitled to a decree against States Marine as any decree of Victory Carriers against Red Stack would necessarily arise from something other than States Marine's breach of the last paragraph of the pilotage clause of May 4, 1956 (R. 62), even if binding.

Issues which are of only secondary international commercial importance, because it is unlikely that precisely the same facts would recur in another case in another port, are (1) whether Red Stack carried its burden of proving that the claimed pilotage clause of May 4, 1956, Respondent's Ex. C (R. 61-62) was binding as *the* con-

tract with States Marine in view of (a) the two other pilotage clauses (R. 61, 66a), used and communicated by Red Stack to States Marine at and after the clause of May 4, 1956, i.e., whether the District Court erred in finding States Marine bound to a contract with Red Stack in the terms set forth in Respondent's Ex. C (R. 61-62) and (b) the monopoly position and unilateral method of attempted imposition of the contract by Red Stack (R. 67-68, 70-71); and (2) whether Red Stack (a) would have been able to limit its liability to Victory Carriers to one-half damages even under Respondent's Ex. C (R. 61-62) and (b) if so, whether Red Stack is entitled to indemnity against States Marine even under Respondent's Ex. C (R. 61-62) in view of Red Stack's independent negligent operation of the Tug SEA SCOUT which combined with the negligence of the pilot to cause the collision damage.

SPECIFICATIONS OF ERROR.

1. The District Court erred in failing to find and hold that Victory Carriers under the terms of the Time Charter was precluded from exacting damages from Red Stack for injury to Victory Carriers' vessel resulting from pilot negligence.

2. The District Court erred in finding (Finding VII, R. 43-44) that States Marine was not authorized to, and did not, bind Victory Carriers to a pilotage clause and that Victory Carriers was not contractually bound by a Red Stack pilotage clause.

3. The District Court erred in finding (Finding V, R. 41-43) that States Marine accepted and was bound by

the Red Stack pilotage clause dated May 4, 1956 (Respondent's Ex. C, R. 61-62).

4. The District Court erred in its implied finding, not expressly stated (cf. Finding VI, R. 43), that Red Stack was justified in relying upon its assumption that States Marine was bound by the warranty of authority contained in the pilotage clause dated May 4, 1956.

5. The District Court erred in failing to find that the Red Stack pilotage clause which appeared on the invoices for the services performed at the time of collision (Impleaded Respondent's Ex. A, R. 66a) was the Red Stack pilotage clause which governed the transaction.

6. The District Court erred in finding (Finding XIII, R. 45) that Red Stack's pilotage clause of May 4, 1956 (Respondent's Ex. C, R. 61-62) would have been legally effective to restrict Victory Carriers to a recovery of only one-half damages against Red Stack if Victory Carriers had been contractually bound by such clause.

7. The District Court erred in failing to find and conclude that the negligence of Red Stack in the operation of the Tug SEA SCOUT (Finding X, R. 44) precluded Red Stack from recovering from States Marine any part of the damages adjudged against Red Stack for the collision.

SUMMARY OF ARGUMENT.

If the decree of the District Court is affirmed this will be the first and only case in which a time charterer, such as States Marine, has ultimately been required to pay damages arising from collision. As maritime col-

lision damage claims are potentially perhaps the largest physical damage tort claims which come before the courts, and as time charterers are not entitled to limit liability, the decision of the District Court has had a seriously disconcerting effect on a commercial status relationship under which an important percentage of the world's waterborne commerce has been conducted for many years.

The decree of the District Court was clearly erroneous in that it failed to give effect to the overriding obligation of the shipowner, Victory Carriers, under clause 26 of the charter party (Libelant's Ex. 16, R. 75) "to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account." The cases have established that by reason of the overriding responsibility of the shipowner for navigation, States Marine as time charterer would not be liable for collision damage to the vessel resulting from negligence of one of State Marine's own employees supplied as pilot under the requirement of clause 2 of the charter party that States Marine "provide and pay for . . . Pilotages, Agencies . . .". The shipowner's contractual and relational responsibility for the navigation of the vessel includes responsibility for incidental services provided under the charter party by the time charterer, and used by the shipowners in navigation, not only when the services are performed directly by the time charterer but also when the performance is delegated to a subcontractor, in this case Red Stack.

In much the same vein, in that the error arose from the District Court's failure to give full effect to the time

charter, was the District Court's clear error in finding that States Marine was without authority to bind Victory Carriers to whatever pilotage clause had been contractually imposed by Red Stack. It is Red Stack's position that if the undocking service had been ordered directly by Victory Carriers, or by Victory Carriers' agent, General Steamship Corporation Ltd., Victory Carriers would have been bound to a pilotage clause under which Red Stack would have been free of liability to Victory Carriers for collision damage resulting from pilot negligence. But under the charter States Marine had authority, as agent, to bind Victory Carriers to whatever contracts were consistent with Victory Carriers' time charter obligation "to remain responsible for the navigation of the vessel, . . . and all other matters, *same as when trading for their own account.*" Victory Carriers had through its own agents employed Red Stack on several occasions during the preceding twelve months and the conclusion is inescapable, we believe uncontested, that if "trading for its own account" Victory Carriers would have been forced to accept whatever pilotage clause or release from liability Red Stack had succeeded in imposing on the San Francisco shipping community. No language of a printed time charter form designed to cover calls at all ports of the world could more aptly grant the time charterer, States Marine, the agential authority to bind the shipowner Victory Carriers to whatever navigational responsibilities it would assume if "trading for its own account" than the mandatory language of clause 2 of the charter party "the Charterers shall provide and pay for . . . Pilotages, Agencies . . ."

The remainder of the argument of appellant, States Marine, is directed to points which are unlikely to recur in other cases.

States Marine contends that the District Court erred in holding that Red Stack had succeeded in imposing on States Marine the pilotage clause of May 4, 1956 (R. 61-62) in light of the fact that then (printed language at foot of R. 61) and repeatedly thereafter (R. 66a, 67-68) Red Stack communicated to States Marine pilotage clauses under which States Marine could have no liability to Red Stack in the present case. Additionally the District Court erred in failing to give effect to the principles that (1) the contributing negligence of Red Stack in the operation of the Tug would, in itself, have entitled Victory Carriers to recover full damages from Red Stack and (2) Red Stack's breach of its implied contractual undertaking to operate its Tug SEA SCOUT in a seamanlike and safe manner, which failure contributed to the damage in question, not only bars Red Stack from any claim it might otherwise have against States Marine for indemnity for the negligence of Red Stack's pilot, but would entitle States Marine to indemnity against Red Stack.

ARGUMENT I.

SPECIFICATION 1. "THE DISTRICT COURT ERRED IN FAILING TO FIND AND HOLD THAT VICTORY CARRIERS UNDER THE TERMS OF THE TIME CHARTER WAS PRECLUDED FROM EXACTING DAMAGES FROM RED STACK FOR INJURY TO VICTORY CARRIERS' VESSEL RESULTING FROM PILOT NEGLIGENCE."

A time charterer is basically a shipper of goods, and in the ancient maritime codes was labeled the "merchant."[1] The time charterer in question is a usual, standard form which, with changes from time to time, has been in use for many years. Although the rights and obligations of the parties to a time charter or "charter-party" are spelled out in considerable detail in the individual contracts, as in this case, the status of a time charterer is largely relational. Under the Charter Party in the present case (Libelant's Ex. 16, R. 75) the shipowner, Victory Carriers, recognized its ancient relational obligation as shipowner by expressly agreeing in clause 1 to provide and pay for all crew expenses, insurance of the vessel, ship's stores and maintenance of the vessel and in clause 26 to remain responsible for "the navigation of the vessel, insurance, crew and all other matters, same as when trading for their own account." The items which States Marine agreed to provide and pay for are those traditional variable items whose total cost is determined by the voyages and ports of call selected by the time charterer. Such variable costs cannot accurately be estimated in advance for inclusion in the daily "hire" rate. The charterer's agreement to provide such

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[1]Cleirac, Les Us. et Coutumes de la Mer (1647), Observation to Article XI of the Laws of Oleron (30 Fed. Cas. 1177).

items is a matter of computation of price or rate of "charter hire" and does not alter the status of the parties, i.e., that of the time charterer as "merchant" and that of the shipowner as owner, navigator and operator of the vessel, even though many of the items which the time charterer provides and pays for, such as "fuel, . . . Port Charges, Pilotages, Agencies . . ." are items accepted, assimilated and employed by the shipowner, Victory Carriers, in discharge of its overriding undertaking to "remain responsible for the navigation of the vessel, . . . and all other matters, same as when trading for their own account."

The intent, history, and purpose of clause 2 of this particular form of charter party are excellently discussed in *Poor on Charter Parties,* 4th Ed., pp. *22-26*. The nature and effect of the shipowner's contractual undertaking to remain solely responsible for matters affecting navigation is authoritatively stated by Wharton Poor, *Poor on Charter Parties,* 4th Ed., pp. *24-25:*

> "A time charter is not a demise of the vessel. The duty of navigation rests entirely upon the owner. For instance, even when a pilot is in the general employ of the charterer, nevertheless it is the owner and not the charterer who is liable for his negligence in navigating. So the charterer is not liable for the negligence of the tugs which he has employed to dock the vessel. And the general duty of loading and discharging is regarded as resting upon the owner. The rule is so absolute that the owner and not the charterer is liable to pay a fine and the costs of legal proceedings incurred by reason of the vessel's entering a Cuban port without a bill of health. Although the expense of procuring the bill of health would fall

upon the charterer, the duty of procuring it is one of navigation.''

In light of the ancient background and the overriding desirability for uniformity in international maritime matters (which underlay the grant of exclusive admiralty jurisdiction to the federal judiciary[2]) it would be at least an anomaly if the status of the time charterer as ''merchant,'' free of responsibility for the navigation and operation of the vessel, were made subject to the local San Francisco exception imposed by the decree of the District Court.

In view of the express undertaking of Victory Carriers in the charter party (Libelant's Ex. 16, R. 75) to ''remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account,'' it is clear that insofar as commercial realities are concerned (which realities the law recognizes rather than ignores unless against public policy[3]) the loss is one which should ultimately be borne by Victory Carriers if of a kind that would be borne by Victory Carriers if ''trading for their own account.'' The principle stated is *a fortiori* valid where the loss is one which the shipowner, through indirection, is attempting to pass on to the merchant-time charterer States Marine.

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[2]Hamilton, "The Powers of the Judiciary." The Federalist No. 80 (McLean's Ed. 1788).

[3]*The Columbian Ins. Co. v. Ashly & Stribling* (1839) 13 Pet. 331, 10 L. Ed. 186—Dealing with the relational obligations of vessel and cargo for general average as developed by ancient usage. *Seas Shipping v. Sieracki* (1946) 328 U.S. 85 at 94; 90 L. Ed. 1099 at 1106.

In ordering the undocking service provided by Red Stack, States Marine was doing only that which was authorized and required of it by Clause 2 of the charter party. The shipowner, Victory Carriers, remained responsible for the damages and risks of faulty navigation, even though such faulty navigation might in fact be that of a pilot directly employed by the time charterer, States Marine and provided by States Marine at States Marine's expense under the charter to assist the shipowner in performance of his duty and responsibility to navigate the vessel.

As was stated in the *Black Gull* (Arbitration) 1947 AMC 156:

> "In my opinion, the fact that the charterer is also the general employer of the pilot does not render the charterer liable for the pilot's acts while the latter is employed by the shipowner in performing its duty to navigate the vessel, unless the pilot is obviously incompetent. If the owner is to remain responsible for navigation, the pilot in navigating the vessel is in the owner's employ although under general employ of the charterer."

To the same effect are the opinions of the Court of Appeals for the Second Circuit in:

The Martin Kalbfleisch (2 Cir., 1893), 55 Fed. 336.
The Volund (2 Cir., 1910) 181 Fed. 643.
Munson S.S. Line v. Glasgow Nav. Co. (2 Cir., 1916) 235 Fed. 64.

and of the Fourth Circuit in:

Bramble v. Culmer (4 Cir., 1897) 78 Fed. 497.

The proposition is well founded in our law that the absolute non-delegable responsibility undertaken by Victory Carriers to "remain responsible for navigation" extends not only to the time charterer, States Marine, when it is performing its obligation of providing "pilotages" through its own employees but also to the corporate supplier or agent, Red Stack, to whom States Marine delegated its obligation under the contract to provide undocking service. This is a matter of interpretation of the contract (Libelant's Ex. 16, R. 75) which is particularly clear in a situation such as the present where an attempt is being made to pass to States Marine a loss of a type which Victory Carriers has expressly agreed it would bear alone.

On April 20, 1959 the United States Supreme Court in *Robert C. Herd & Company v. Krawill Machinery Corporation* under Docket No. 276 (reported at 27 Law Week 4257) affirmed the holding of the Court of Appeals for the Fourth Circuit in *Herd v. Krawill Machinery Corp.* (4 Cir. 1958) 256 F. 2d 946 that a provision in the shipowner's bill of lading which limited the shipowner's liability to $500 per package, but which did not refer to the stevedoring contractor, was not designed for the benefit of anyone except the shipowner and did not operate to limit the liability of the negligent stevedoring contractor to the cargo owner. The bill of lading provision considered by the U. S. Supreme Court in the *Herd* case provided only that "the carrier's liability, if any, shall be determined on the basis of $500 per package." Such a limited contractual provision is a far cry from the sweeping, all inclusive undertaking of the shipowner, Victory Carriers,

in the present case, under clause 26 of the Charter Party (Libelant's Ex. 16, R. 75) "To remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account."

As the Supreme Court said in the *Herd* case, referring to the restricted language of the bill of lading provision there in question:

> "There is, thus, nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract. Since they did not do so, it follows that the provisions of the bill of lading did 'not cut off [respondent's] remedy against the agent that did the wrongful act.' "

The relationships and cross relationships arising from the performance of a time charter are such that it has long been recognized by the courts, that the contractual privileges obtained by one party are intended to, and do, extend to the benefit of those to whom a portion of the performance has been delegated.

In *Elder, Dempster & Co., Ltd. and others v. Paterson, Aochonis & Co., Ltd.* [1924] A.C. 522; (1924) 18 Ll. L. Rep. 319, a case which also involved a time charter relationship, the House of Lords (Viscount Cave, Lord Dunedin, Lord Sumner and Lord Carson; Viscount Finlay agreeing on this point but dissenting on the other grounds) held, against the shipper's contention to the contrary, that the shipowner, although not a party to the

bill of lading was protected by the provision in the bill of lading between the shipper and the charterer exempting from liability for damage to the goods resulting from bad stowage.

As Viscount Cave said in his opinion:

> "It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Scrutton, L.J. says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals." Id., [1924] A.C. 522, 534; (1924) 18 Ll. L. Rep. 319, 321.

In *Wilson v. Darling Island Stevedoring and Lighterage Company Ltd.* (1936) 1 Ll. L. Rep. 346, 363 Justice Fullagar of the High Court of Australia, while declining to apply a provision of the shipowner's bill of lading to the benefit of a stevedoring contractor, in discussing the *Elder, Dempster* case said:

> "It turned, in my opinion, on the very special and peculiar relationships which are created when goods are consigned to be carried on a chartered ship."

Among the many cases, including a recent decision of this Honorable Court, which have held the subcontractor or agent within the protection of the principal's contractual or relational privilege or immunity are:

Twentieth Century Delivery Service v. St. Paul Fire and Marine Ins. Co. (9 Cir., 1957) 242 F. 2nd 292 at 297. A terminal delivery company performing the delivering service for an air freight line held entitled to the limitation of liability stated in the air line bill of lading.

The South Star (2 Cir., 1954) 115 F. Supp. 102, 210 F. 2nd 44. A stevedoring contractor held entitled

to the benefit of the provision in the shipowner's bill of lading governing the time for filing suit.

Berger v. 34th Street Garage (1958) 3 N.Y. 2d 701, 148 N.E. 2d 883. A garageman to whom a trucker had entrusted goods was held entitled to the benefit of the limitation of liability provisions of the trucker's contract with the shipper.

Herzog v. Mittleman (1937) 155 Ore. 624, 65 P. 2d 384. A guest held entitled to the benefit of the Oregon automobile "guest" statute when himself driving at request of host owner as against claim of another injured guest.

Maghee v. The Camden & Amboy RR Co. (1871) 45 N.Y. 514, 520. A carrier selected to perform part of the contract of carriage entered into by the original carrier held entitled to the benefit of the provisions therein contained limiting liability although not a party thereto.

Schoeffer v. United Parcel Service of N.Y. (1950) 277 App. Div. 569, 571, 101 N.Y.S. 2nd 451. The parcel delivery service which lost the plaintiff's furs held entitled to the benefit of the limitation of liability provision of the contract between the plaintiff and the fur storage company, whose contract the parcel delivery service was in part performing. Accord: *Employers Fire Insurance Co. v. United Parcel Service* (1950) 80 Ohio App. 477, 99 N.E. 2nd 794.

Ivy H. Smith v. Warffemius (1953) 201 Md. 367, 93 A. 2nd 764. A contractor cutting timber under contract with an electric company held not liable to the landowner where the cutting of timber was

permitted by an easement held by the electric company.

Wilder v. Pennsylvania R. Co., 245 N.Y. 36, 156 N.E. 88. An exemption from liability provision in a railroad's pass form held to protect the railroad terminal operator. Accord: Hall v. North Eastern R. Co. (1875) L.R. 10 Q.B. 437; Bicknell v. Grand Trunk R. Co. (1899) 26 Ontario App. Rep. 431; but cf. Parker v. Bissonette, (1943) 203 S.C. 155, 26 S.E. 2nd 497.

Commercial Credit Corp. v. Harris (1950) 227 S.W. 2nd 886. A finance company as agent of lienor can repossess free of tort liability where principal would be so privileged.

The principle of the foregoing authorities is accorded full recognition in the 1958 edition of Secs. 345 and 347 of the American Law Institute Restatement of the Law of Agency (2nd) which has recently been revised to read as follows:

"Sec. 345. *Agent Exercising Privileges of Principal.*

An agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have an agent do it and has authorized the agent to do it."

"Sec. 347. *Immunities and Standard of Care of Principal.*

(1) An agent does not have the immunities of his principal although acting at the direction of the principal.

(2) Where, because of his relation to a third person, a master owes no duty, or a diminished duty, of care, a servant in the performance of his master's work

owes no greater duty, unless there has been reliance by the master or by a third person upon a greater undertaking by the servant."

"Comment on Subsection (2):
. . . An employer may by contract relieve himself from liability for ordinary negligence to purchasers, bailors and beneficiaries. In all of such cases, a servant or other agent is not required to meet a higher standard than that required of the principal . . ."

It is respectfully submitted that the provisions of the charter party, the relationship between the parties, the principle of the foregoing cases including the decision of this Honorable Court in the *Twentieth Century Delivery Service* case as well as the recently revised pertinent sections and comments of Agency 2nd, all affirm that the privilege under the terms of the charter party of States Marine extended to protect Red Stack from liability to Victory Carriers for collision damage resulting from pilot negligence while Red Stack was performing the pilotage function delegated to it by States Marine under the charter party. There is nothing in the recent decision of the U. S. Supreme Court in the *Herd* case which would indicate disapproval of the principle as stated both by the foregoing cases and by Agency 2nd. On the contrary the language in the *Herd* case makes clear that the Court would extend the benefit of the time charter provision to the tugboat company. Not only the wording of the time charter itself but the very existence of the present litigation make clear that the contractual undertaking of the shipowner, Victory Carriers, to remain responsible for navigation must extend not only to States Marine but

to Red Stack to assure States Marine itself of the benefit of such provision.

ARGUMENT II.

SPECIFICATION 2. "THE DISTRICT COURT ERRED IN FINDING (FINDING VII, R. 43-44) THAT STATES MARINE WAS NOT AUTHORIZED TO, AND DID NOT, BIND VICTORY CARRIERS TO A PILOTAGE CLAUSE AND THAT VICTORY CARRIERS WAS NOT CONTRACTUALLY BOUND BY A RED STACK PILOTAGE CLAUSE."

In the context of the present case the loss remains upon Victory Carriers if, assuming the validity of such "pilotage" clause, a pilotage clause of Red Stack was binding upon Victory Carriers.

Victory Carriers had itself dealt with Red Stack during the twelve months before the collision and had received Red Stack invoices (R. 79) which contained the Red Stack "pilotage clause" (R. 67-68) which appears at the bottom of Impleaded Respondent's Ex. A (R. 66a). A party to a contract impliedly receives from the other party the authority (or agency) necessary to perform the contract. in accordance with its terms.[4] In the present case, under the terms of the Charter Party, States Marine was obligated to provide and pay for an undocking service, as well as "Pilotages, Agencies," but the responsibility for navigation, including the responsibility for piloting during the period of undocking clearly remained the sole responsibility of Victory Carriers "as when trading for their own account." There is no intimation that States

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[4]Mechem, Outlines of Agency, 3rd Ed. §§100, 101; *Leroy v. Beard* (1850) 49 U.S. (8 How.) 451, 12 L. Ed. 1151.

Marine was in any way negligent or improvident in ordering such undocking service from Red Stack. In fact the record indicates that the undocking service for the time in question could have been obtained only from Red Stack (R. 70-71). In such circumstances there is only one reasonable construction of the Charter Party, and of the relationship between Victory Carriers as shipowner and States Marine as merchant-time charterer. That construction is that States Marine was obligated to provide and pay for an undocking service to be used by Victory Carriers in navigating the vessel and in so doing was authorized to bind Victory Carriers to such contractual provisions consistent with Victory Carriers' contractual undertaking to "remain responsible for the navigation of the vessel," as might be reasonably necessary for the securing of such undocking service for Victory Carriers "same as when trading for their own account" (Libelant's Ex. 16 Clause 26, R. 75).

States Marine's contention that it was authorized to bind Victory Carriers to whatever pilotage clause Red Stack had succeeded in imposing on the San Francisco shipping community would indicate a result contrary to that reached by the Court of Appeals for the Second Circuit in the *West Eldara* (1939) 104 F. 2d 670, modifying 101 F. 2d 45, cert. den. 308 U.S. 607. There are three reported decisions in the *West Eldara.* The first decision, by the District Court, is reported at 1938 AMC 282. The facts as reported in the opinion of the District Court indicate that the time charterer arranged for towage and that the vessel, as here, was damaged while being docked through negligence of the tug master aboard the vessel

serving as docking master or pilot. The vessel owner sued both the time charterer and the towing company for the damage. The District Court held that the towing company's pilotage clause was not binding on the vessel owner, that the vessel owner, accordingly, was entitled to recover its damages from the towing company but that the towing company was entitled to indemnity from the time charterer, apparently on the ground that the time charterer had dealt with the towing company as principal.

In the first decision of the Court of Appeals for the Second Circuit, reported at 101 F. 2d 45, the Court reversed, holding that the shipowner had no right to recover from anyone on the theory that the owner was responsible for navigation and that the owner's acquiescence in the performance of pilotage services by the tug master rendered the pilot in effect the servant of the vessel while performing such services.

In the second decision of the Court of Appeals for the Second Circuit, reported at 104 F. 2d 670, 671, the Court modified its prior holding, and the decision of the District Court, to hold that the vessel owner was entitled to recover full damages from the towing company, but that the towing company was not entitled to indemnity from the time charterer.

It is significant that the Court of Appeals for the Second Circuit did not give any direct discussion in either of its opinions in the *West Eldara* case to the question here involved, i.e., whether the time charterer in ordering an undocking service under the authority of Clause 2 of the time charter requiring the time charterer to "... provide and pay for ... Pilotages, Agencies ..."

was authorized to bind the owner to a pilotage clause to which the shipowner would have been bound if ordering such service "when trading for its own account."

In its first opinion 101 F. 2d 45 at 48 the Court passed over the question, which was moot on the view which the Court then took of the case, saying (at page 48):

> "*Conceding* that the charterer had no authority to bind the owner by its engagement with the towing company still the owner's representative on the ship, the master, acquiesced in and consented to Capt. Cregan's coming on board and directing the vessel's navigation while docking . . . retention of control over navigation of the vessel made Cregan's acts its own." (Emphasis supplied).

In its second opinion in the *West Eldara* case, on rehearing, reported at 104 F. 2d 670, 671 the Court of Appeals for the Second Circuit gave the following consideration to the question of the time charterer's agential authority to bind the vessel owner to a pilotage clause:

> "Upon the facts as stated in the previous opinion, the West Eldara, 101 F. 2d 45, with which familiarity is now assumed, we *held* that the pilotage clause was not binding upon the shipowner. This is so because the charterer was not the agent of the owner in contracting with the towing company to dock the vessel. The NIELS R. FINSEN, D.C., 52 F. 2d 795; The Kate, 164 U.S. 458, 17 S.Ct. 135, 41 L. Ed. 512." (Emphasis supplied).

The Court of Appeals for the Second Circuit having treated its *arguendo* concession in its first opinion as a "holding" then, in its second opinion, proceeded to hold that the vessel owner's acquiescence in the presence of a

pilot did not render the pilot the sole employee of the vessel owner and that the time charterer had not warranted anything to the towing company in merely ordering tug service.

It is interesting to note that the only citations given by the Court of Appeals for the Second Circuit in its second opinion with respect to the agency of the time charterer were the *Niels R. Finsen,* 52 F. 2d 795, in which case at page 799 the Court had said:

> "If, on the other hand, the pilotage clause were to be held binding on the owners, this could be only on the assumption that the clause was such a customary one or even such a universal one in towing work in New York Harbor that the owners, by stipulating that the charterer should provide pilotage, consented to have their ordinary rights abridged by the pilotage clause."

It should be noted that in the *Niels R. Finsen* case the determination and discussion as to the agential authority of the time charterer to bind the vessel owner to the towing company's pilotage clause was determined in a vacuum as the towing company was insolvent and the vessel owner's only practical recourse was against the time charterer. The vessel owner, of course, was denied recovery against the time charterer on the grounds that if the owner were bound to a pilotage clause he had not been harmed as such binding would have been in accordance with his authorization and on the other hand if he were not bound he of course had not be harmed.

The other case cited by the Court of Appeals for the Second Circuit in its second opinion in the *West Eldara*

case was *The Kate* (1896) 164 U.S. 458, 41 L. Ed. 512. It was the holding of the U. S. Supreme Court in *The Kate* that as to a person who knew or should have know that under the time charter the charterer was obligated to pay for fuel the time charterer lacked sufficient authority to impose a lien on the vessel in favor of the supplier for coals furnished at the charterer's request. It is not States Marine's contention in the present case that it had authority to bind Victory Carriers to pay for items for which States Marine had expressly agreed to pay, but only that States Marine had authority to bind Victory Carriers to the assumption of responsibilities in connection with the navigation of the vessel consistent with Victory Carriers' express contractual undertaking "to remain responsible for the navigation of the vessel . . . same as when trading for their own account." The holding in *The Kate* was reversed by the U. S. Supreme Court in *Damp, Danneborg v. Signal Oil Co.* (1940) 310 U.S. 268, 84 L. Ed. 1197 to give effect to the Maritime Lien Act of 1920 (46 USC Sec. 971 et seq.) where the time charter did not contain an express prohibition against the imposition of liens upon the vessel by the time charterer.

In the *People of the State of California v. the SS Jules Fribourg* (N.D.Cal. S.D. 1956) 140 F. Supp. 333 which involved a time charter collision situation similar to that presented by the present case and in which, like here, the time charterer was States Marine and the tug company was Red Stack, Judge Louis E. Goodman, relying on the *West Eldara* in discussion rejected, but not as a holding, the contention there made by Red Stack that the vessel owner was bound to the pilotage clause through the

time charterer's authority to so bind saying, at pages 339, 340:

> "It is true that in providing a pilot, the charterer acted in behalf of the owner, since the charter imposed upon the owner the responsibility for navigation. Had the charterer provided for the pilotage of the Jules Fribourg by hiring an independent pilot, he would have become the servant of her owner, not the charterer. But, the charterer in dealing with the tug company did not act as the owner's agent. The charterer had the authority to provide for pilotage, but whatever undertaking it entered into in doing so was its own responsibility. It is not reasonable to imply from the charterer's authority to provide a pilot, the incidential authority either to waive any rights of the owner or to subject the owner to an employer's responsibility for the actions of a person who in fact was controlled by and owed primary allegiance to another employer. The implication of such authority would not be justified even if, as the tug company contends, the owner of the Jules Fribourg was aware that pilotage clauses such as the present one were in frequent use."

In determining the *Jules Fribourg* case the District Court found that the particular negligence of the pilot which gave rise to the collision in that case was a negligence as to which the pilotage clause did not afford protection. Accordingly the question of whether or not the vessel owner was bound to the terms of the pilotage clause through the time charterer was moot to the determination of the case and as the District Court said (at p. 340) in considering Red Stack's contention that it was

entitled to indemnity against the charterer, States Marine, "for having breached a waranty of authority":

> "This contention is rendered moot by the conclusion that the pilotage clause did not cover the negligent act of Captain Markley."

Neither in the *West Eldara* cases nor in the *Jules Fribourg* case, nor in any other case, has any court upon adversary consideration determined, as a ground necessary to decision,[5] adversely to the contention here made by States Marine that as time charterer obligated under Clause 2 of Libelant's Ex. 16 (R.75) to "provide and pay for . . . Pilotages, Agencies . . ." it was authorized to bind the vessel owner, Victory Carriers, to whatever assumption of responsibility for navigation of the vessel was exacted by the company providing the undocking service, Red Stack, to the extent that the responsibility to be assumed by the vessel owner under the pilotage clause was consistent with that expressly assumed by the vessel owner, Victory Carriers, in Clause 26 of Libelant's Ex. 16 (R.75) ". . . to remain responsible for the navigation of the vessel . . . same as when trading for their own account."

The conclusion suggested by States Marine would appear inescapable in view of the uncontradicted evidence that

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[5]"The materials on which these conclusions are based are not esoteric. They are to be assessed, of course, according to time-honored rules for reading cases—that cases hold only what they decide, not what slipshod or ignorant headnote writers state them to decide; that decisions are one thing, gratuitous remarks another. A stew may be a delicious dish. But a stew is not to be made in law by throwing together indiscriminately decision and dicta . . ." Frankfurter, J., dissenting in *Bisso v. Inland Waterways Corp.* (1955) 349 U.S. 85, 100, 99 L. Ed. 911, 922.

Red Stack was the only firm in the San Francisco Bay Area offering a complete docking service (R.70), was the only company in the San Francisco Bay Area offering the services of large horsepower deep draft tugs (R.71), and used the same form of invoice with the same form of pilotage clause that appears on Impleaded Respondent's Ex. A (R.66a) on all of its billings for all tugboat services during the twelve months preceding the date of the collision, January 23, 1957, including the several occasions during that period when Victory Carriers had itself through its own agents used Red Stack to assist in moving its vessels. (R.79).

Other provisions of the charter party (Libelant's Ex. 16 R.75), in addition to those previously noted, which clearly disclose the shipowner's intent to vest actual and ostensible agential authority in the charterer, States Marine are clause 8, ". . . The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; . . ." and clause 31 "Charterers' privilege of painting their house flag and markings on vessel's funnel . . ."

ARGUMENT III.

SPECIFICATION 3. "THE DISTRICT COURT ERRED IN FINDING (FINDING V, R. 41-43) THAT STATES MARINE ACCEPTED AND WAS BOUND BY THE RED STACK PILOTAGE CLAUSE DATED MAY 4, 1956 (RESPONDENT'S EX. C, R. 61-62)."

SPECIFICATION 4. "THE DISTRICT COURT ERRED IN ITS IMPLIED FINDING, NOT EXPRESSLY STATED, (cf. FINDING VI, R. 43) THAT RED STACK WAS JUSTIFIED IN RELYING UPON ITS ASSUMPTION THAT STATES MARINE WAS BOUND BY THE WARRANTY OF AUTHORITY CONTAINED IN THE PILOTAGE CLAUSE DATED MAY 4, 1956."

SPECIFICATION 5. "THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE RED STACK PILOTAGE CLAUSE WHICH APPEARED ON THE INVOICES FOR THE SERVICES PERFORMED AT THE TIME OF COLLISION (IMPLEADED RESPONDENT'S EX. A, R. 66a) WAS THE RED STACK PILOTAGE CLAUSE WHICH GOVERNED THE TRANSACTION."

The pilotage clause of May 4, 1956 (Respondent's Ex. 2, R. 61-62) under which Red Stack asserts its claim against the merchant time charterer States Marine, purports to have Red Stack and the negligent Red Stack pilot held harmless and indemnified by the merchant against damages caused by the negligence of the pilot. The drastic nature of the revision in relationships between pilot and merchant which Red Stack seeks to impose through its unilateral dealing is disclosed by comparison of the result sought by Red Stack against the traditional responsibility of pilot to merchant recorded in Article XXIII of the Laws of Olreon (12th Century):[6]

> "If a pilot undertakes the conduct of a vessel, to bring her to St. Malo, or any other port, and fail of his duty therein, so as the vessel miscarry by reason of his ignorance in what he undertook, and

[6]Laws of Oleron, reprinted at 30 Fed. Cas. 1171 at 1180.

> the merchants sustain damage thereby, he shall be obliged to make full satisfaction for the same, if he hath wherewithall; and if not, lose his head."

Even if this Honorable Court should find Victory Carriers entitled to recover against Red Stack for pilot negligence, the individual facts of the present case do not justify the transfer of such liability for collision damages from Red Stack to States Marine. In order to obtain recovery over against States Marine, Red Stack must establish that the "pilotage clause" dated May 4, 1956 (R. 61-62) was *the* contract between the parties. There is no claim of any express manifestation by States Marine of a consent to this particular pilotage clause. The District Court found (Finding V, R. 41) implied consent by States Marine from its previous dealings with Red Stack and the fact that States Marine had received a letter in the form of Respondent's Ex. C (R. 61-62). The record, however, shows that simultaneously with receipt of the form of pilotage clause upon which Red Stack relies, Red Stack, on its letterhead, communicated to States Marine another form of pilotage clause, under which it would not be entitled to claim indemnity against States Marine reading:

> "When the captain or any other officer of any tug furnished to or engaged in the service of assisting or towing a self-propelled vessel, goes on board such vessel, or any other licensed pilot goes on board such vessel, whether or not such vessel has available for use or is making use of her own propelling power, it is understood and agreed that such tug captain, other officer or licensed pilot becomes the servant of the vessel assisted or towed, and her owner, in respect

to the giving of orders to any of the tugs furnished to or engaged in the assisting or towing service, and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot, nor the tugs, their owners, charterers, operators, managers and agents, shall be liable for any damage resulting therefrom.

"Consistent with its other commitments this company will endeavor to supply tug power upon receipt of order, but it shall not be responsible for delays, expense or damage caused by strikes, accidents, fire, weather or other cause of whatsoever nature beyond its control."
(Language at foot of Respondent's Ex. C, R. 61).

In addition the record shows (Testimony of Collar, R. 64, 67-68) that still another form of pilotage clause, under which Red Stack would not be entitled to indemnity against States Marine, was used by Red Stack on all invoices sent by it to States Marine for tug services after May 4, 1956 up to and including the invoice of January 23, 1957 for the tug services involved in the collision in question (printed clause appearing at foot of Impleaded Respondent's Ex. A, R. 66a) which reads as follows:

"When the captain or other officer of any tug provided for, or engaged in, the service of furnishing tug power for, or assistance to, a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or other officer or licensed pilot become the servant of the owners of said vessel in respect to the giving of orders to any of the tugs provided for, or engaged in, said service and in respect to the handling

of such vessel, and neither those providing the tug or tugs nor the tug or tugs, their owners, agents or charterers shall be under any liability for damages resulting therefrom, and, further, that said tug or tugs and/or their owners, agents and/or charterers shall be under no liability for executing the orders of said tug captain or other officer or licensed pilot.

"This company agrees to supply tug power promptly consistent with other commitments, upon receipt of orders, but will not be responsible for delays, extra expenses or damages caused by strikes, accidents, fire, weather, or any other causes whether of similar or dissimilar nature beyond its control."

It was clear error in such circumstances for the District Court to have found that the text of Red Stack's unilateral letter of May 4, 1956 was *the* contract between States Marine and Red Stack.

The U. S. Supreme Court in *Bisso v. Inland Waterways Corp.* (1955) 349 U.S. 85; 99 L. Ed. 911 held a release of liability clause, similar to those involved in the present case, invalid when attempted to be applied by a towing company to relieve itself of liability for negligent damage to its tow, saying at page 91:

"An increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions."

In the *Bisso* case the Supreme Court then went on to distinguish the pilotage situation from the towage situation on the ground (pp. 92, 93 and 94) that pilots are extensively regulated by both state and federal governments and that their fees are fixed by law to avoid dis-

crimination in their charges. This basis of distinction does not exist in the present case with respect to the services as docking master performed by Captain Garner H. Long. There was, and is, no state or federal regulation of the charges imposed for docking service and docking service is in no sense "compulsory pilotage." In the facts of the present case there was no state or federal law or regulation requiring a "pilot" to be used in the docking of the SS LEWIS EMERY, JR., or regulating Red Stack's charges for such services. In the present case, much more clearly than in the *Bisso* case, the monopoly position of Red Stack in the furnishing of undocking services in the San Francisco Bay Area is disclosed (R. 70-71).

In his concurring opinion in *Boston Metals Co. v. SS Winding Gulf* (1955) 349 U.S. 122 at 127, 99 L. E. 933, at 938, Mr. Justice Frankfurter pointed out that practical necessity of strictly limiting pilotage clauses because of the hazard that the failure of cooperation of the towage company, if completely protected would give unjust results in litigation, saying:

> "There are good reasons why this should not be undertaken, among them the fact that in a suit to which the tug is not a party it may be difficult to obtain the full assistance of the tug in establishing non-liability or avoiding an unfairly large recovery than might have been or subsequently is had against the tug."

The practical wisdom and perspicacity of Justice Frankfurter's comment is well evidenced by the present case in which Red Stack pleaded its own employee, Garner H. Long solely at fault for the collision (R. 11).

In view of the uniform use by Red Stack of the pilotage clause shown on Impleaded Respondent's Ex. A. (R. 66a) during the twelve months before the collision on January 23, 1597 (R. 67-68), under which clause there could be no liability of States Marine to Red Stack, it was clear error for the District Court to find that Red Stack had carried its burden of proving that by its unilateral dealings from a monopoly position it had succeeded in imposing Respondent's Ex. C (R. 61-62) as *the* contract between the parties.

ARGUMENT IV.

SPECIFICATION 6. "THE DISTRICT COURT ERRED IN FINDING (FINDING XIII, R. 45) THAT RED STACK'S PILOTAGE CLAUSE OF MAY 4, 1956 (RESPONDENT'S EX. C, R. 61-62) WOULD HAVE BEEN LEGALLY EFFECTIVE TO RESTRICT VICTORY CARRIERS TO A RECOVERY OF ONLY ONE-HALF DAMAGES AGAINST RED STACK IF VICTORY CARRIERS HAD BEEN CONTRACTUALLY BOUND BY SUCH CLAUSE."

Red Stack's claim for indemnity is premised solely on the second paragraph of its May 4, 1956 pilotage clause and in essence is a claim for reimbursement of the damages which it *allegedly would not have had to pay* if Victory Carriers had been a party to the first paragraph of such clause. Clauses virtually identical to that contained in the first paragraph of the pilotage clause of May 4, 1956 have been held by the Supreme Court to be mere "release from liability" clauses ineffective to constitute the pilot the "employee or servant" of the vessel owner.

In *United States v. Neilson (Christopher Gale Dauntless)* (1955) 349 U.S. 129, 99 L. Ed. 939, the U. S. Su-

preme Court considered the effect of a pilotage clause which provided that a tugboat captain or pilot going on board would become the:

> "servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting services and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

Against the contention of the tugboat company that the language of the pilotage clause was not against public policy and was effective to constitute the pilot the "servant" of the vessel owner, the Supreme Court held that the clause was effective only to release the tugboat company from liability to the vessel owner for damages resulting from negligence of the tugboat captain while serving as pilot.

In *Boston Metals Co. v. SS Winding Gulf* (1955) 349 U.S. 122, 99 L. Ed. 933, the U. S. Supreme Court held that regardless of the effectiveness between the parties of a towage clause, similar to a pilotage clause, the contractual arrangements between the towing company and the vessel owner were not sufficient to cause the negligence of towing company's employees to be imputed to the vessel owner in litigation with third parties arising from damage to the vessel because of negligence of the towing company's employees.

Applying the principle of the opinion of the U. S. Supreme Court in *United States v. Nielson,* supra, to any of the "pilotage" clauses in the present case the result

is that at most, if one of Red Stack's pilotage clauses had been binding on Victory Carriers, as between Red Stack and Victory Carriers, the Red Stack employee, pilot Garner H. Long, would be absolved of negligence. In such circumstance Victory Carriers would be entitled to recoup full damages from Red Stack by reason of Red Stack's negligent operation of its Tug SEA SCOUT. The rights of Victory Carriers against Red Stack, if Victory Carriers had been bound by a pilotage clause, would be no different than those of the innocent cargo in the *Chattahoochee* (1899) 173 U.S. 540, 43 L. Ed. 801 in which it was clearly established that under American law, cargo, even though having released its carrying vessel from liability for damage resulting from negligent navigation could nonetheless collect full damages from the noncarrying vessel in a mutual fault collosion.

Victory Carriers and Red Stack were not strangers in the activity giving rise to the collision. Whether or not Victory Carriers was bound by a "pilotage" clause, Red Stack's obligation and duty to Victory Carriers should have been, and was, measured by a contractual standard calling for special skill and the exercise of a high degree of seamanship and care in the performance of its duties in assisting the SS LEWIS EMERY, JR. to undock.

> "The tug is engaged to perform a task which she holds herself out as being capable of performing. When, through failure to take action to prevent coming into contact with a steamship propeller, the tug strikes and damages it, the tug is liable." *Grace Line v. The C. Hayward Meseck* (DCSDNY 1957) 150 F. Supp. 425, aff'd (2 Cir. 1957) 248 F. 2d 736.

It is thus clear that even if Victory Carriers had been contractually bound by a pilotage clause to release Red Stack from liability for pilot negligence, nonetheless Red Stack would have been liable in full damages to Victory Carriers by reason of the fact that the collision damage arose from and was contributed to by Red Stack's breach of its implied contractual obligation to operate its tug in a seamanlike and safe manner.

Weyerhaeuser v. Nacirema (1958) 355 U.S. 563, 2 L. Ed. 2d 491.

Ryan v. Pan-Atlantic (1956) 350 U.S. 124; 100 L. Ed. 133 at 142.

Mowinckels v. Commercial Stevedoring Co. (2 Cir. 1958) 256 F. 2d 277.

Crumady v. Joachim Hendrik Fisser (1959) ..... U.S. ....., 3 L. Ed. 2d 413.

Accordingly Red Stack has suffered no damage by reason of States Marine's failure so to bind Victory Carriers, if it did so fail.

ARGUMENT V.

SPECIFICATION 7. "THE DISTRICT COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT THE NEGLIGENCE OF RED STACK IN THE OPERATION OF THE TUG SEA SCOUT (FINDING X, R. 44) PRECLUDED RED STACK FROM RECOVERING FROM STATES MARINE ANY PART OF THE DAMAGES ADJUDGED AGAINST RED STACK FOR THE COLLISION."

Red Stack is pursuing States Marine exclusively on a contractual basis. In so far as Red Stack relies upon contract, an essential implied provision of that contract was that Red Stack would perform the undocking serv-

ice and would operate its tugboat in a seamanlike and safe manner so as to avoid damage or disadvantage to its employer. *Grace Line v. The C. Hayward Meseck* (DCSDNY 1957) 150 F. Supp. 425, aff'd (2 Cir. 1958) 248 F. 2d 736. Red Stack, however, operated its tugboat in a negligent and improper manner which contributed to the collision. The cases hold a contractor, such as Red Stack, bound to indemnify its principal where the principal, even though negligent, suffers damage by reason of the contractor's improper performance of its obligation, *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.* (1958) 355 U.S. 563, 2 L. Ed. 2d 491, but the rule is that a party who would otherwise be entitled to contractual indemnification, as Red Stack claims here, forfeits such right if its independent negligence (in this instance the negligent operation of the Tug SEA SCOUT) contributed to the damage for which indemnification is sought. *American Steamship Company v. Copp* (9 Cir. 1957) 245 F. 2d 291.

CONCLUSION.

Appellant, States Marine, respectfully submits alternatively (1) that Victory Carriers was not entitled to recover from Red Stack for pilot negligence but (2) that Victory Carriers was in any event entitled to recover full damages from Red Stack by reason of the negligence of Red Stack in operation of the Tug SEA SCOUT and (3) that Red Stack had not succeeded in contractually imposing the pilotage clause of May 4, 1956 on States Marine. In either event Red Stack suffered no damage from States Marine's alleged failure to bind Victory

Carriers to the pilotage clause of May 4, 1956, and the decree of the District Court requiring States Marine to pay to Red Stack one-half of the damages adjudged against Red Stack in favor of Victory Carriers accordingly should be reversed with mandate to the District Court to enter decree in favor of States Marine with costs.

Dated, April 30, 1959.

Respectfully submitted,

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FRANCIS L. TETREAULT,

Attorneys for Appellants.

(Appendix A Follows.)

Appendix "A"

Appendix A

INDEX RE ADMISSION OF EXHIBITS PER RULE 18(2)(f).

Exhibits	Page at Record at Which Admitted
Libelant's Exhibit 16 (Time Charter)	74
Respondent's Exhibit C (Letter dated May 4, 1956)	60
Respondent's Exhibit D (Schedule of Rates)	64
Impleaded Respondent's Exhibit A (Three invoices dated January 21, 22, and 23, 1957)	66-67